

# A Practical Guide for Family Carers on the Assisted Decision-Making (Capacity) Act 2015



**Community  
Law & Mediation**



**Family  
Carers  
Ireland**

No one should have to care alone

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## ABOUT THIS GUIDE

Looking after someone can be a rewarding experience. However, it can also be lonely and difficult to understand the various supports and legal arrangements that exist. But you're not on your own. This guide will help explain the Assisted Decision-Making (Capacity) Act, which commenced on April 26th 2023, in simple language and with examples.

If you still have questions or concerns about the Act you can contact your local Family Carers Ireland Support Centre:

- Find your nearest Centre by visiting [www.familycarers.ie](http://www.familycarers.ie) or
- Freephone our Careline 1800 24 07 24

or please contact the [Decision Support Service](#).

This guide has been prepared by Community Law & Mediation (CLM) on behalf of Family Carers Ireland. CLM is an independent, community-based law centre that works to empower individuals experiencing disadvantage through free legal information, advice and representation; mediation and conflict coaching; information and education and policy and law reform.

Family Carers Ireland is **the** national charity dedicated to supporting Ireland's 500,000+ family carers. The charity is here to listen, to give expert information and guidance and to champion carer rights. Our vision is an Ireland in which family carers are properly recognised, supported and empowered and where **no one should have to care alone**.



### Disclaimer

The information in this document is not intended to provide, and does not constitute, legal or any other advice on any particular matter, and is provided for general information purposes only. The authors give no guarantees or warranties concerning the accuracy, completeness or up-to-date nature of the information provided in this guide and do not accept any liability arising from any errors or omissions. The information is correct as of March 2023.

## **GLOSSARY: LEGAL TERMS EXPLAINED**

### **ASSISTED-DECISION MAKING (CAPACITY) ACT 2015**

#### **Capacity Act**

The Assisted Decision-Making (Capacity) Act 2015 is often called 'The Act' or the '2015 Act'. The Capacity Act establishes a new legal framework for supported decision-making.

#### **Capacity**

A person's ability to make decisions. Under the 2015 Act, this will be based on the person's ability to make a specific decision at a specific time.

#### **The Decision Support Service (DSS)**

A public body established within the Mental Health Commission by the Assisted Decision-Making (Capacity) Act 2015. Its job is to register the new decision support arrangements and supervise the individuals who are providing support to people with capacity difficulties.

#### **Decision Support Arrangements**

An umbrella term for all of the legally recognised arrangements to support people who have challenges with their capacity to make certain decisions.

#### **Decision Supporter**

An umbrella term for any person who is given the legal authority to support someone with capacity challenges to make certain decisions. They must be appointed to their role in a legally recognised arrangement called a decision support arrangement. The type of support they can provide depends on the type of arrangement in place.

#### **Decision-Making Assistance Agreement**

A legally recognised arrangement that you can make if you need support to make certain decisions for yourself. It lets you give someone you know and trust the legal authority to help you, by gathering information and helping you to understand it, as well as helping you to make a decision, communicate your decision and make sure it is acted on.

#### **Decision-Making Assistant**

A person who has the authority to help you when you are making certain decisions for yourself. You can appoint someone you know and trust to be your Decision-Making Assistant by making a legally recognised arrangement called a Decision-Making Assistance Agreement.

#### **Co-Decision-Maker**

A person who has the authority to make certain decisions together with you if you need support to make decisions. You can appoint someone you know and trust to be your Co-Decision-Maker by making a legally recognised arrangement called a Co-Decision-Making agreement.

### **Co-Decision-Making Agreement**

A legally recognised arrangement that you can make if you are unable to make certain decisions by yourself and require support. It lets you set out the types of decisions you want help with and give a person you know and trust the authority to make them together with you.

### **Decision-Making Representation Order**

A legal arrangement made by an order from the Circuit Court. The Court can appoint a person to make certain decisions on your behalf if you are unable to make them for yourself. This person is called a Decision-Making Representative.

### **Decision-Making Representative**

A person appointed by the Circuit Court to make certain decisions on your behalf if you are unable to make them for yourself. Where possible, the court will appoint someone you know and trust in this role. If there is no one suitable who is able to do the role, the court can appoint a Decision-Making Representative from a panel of trained experts maintained by the Decision Support Service.

### **Ward of Court**

Under the previous law, if a person was unable to make certain decisions because of capacity difficulties, they may have been made a Ward of Court. When a person was made a Ward of Court, a Committee was appointed to control their assets and make decisions about their affairs.

## **PLANNING AHEAD**

### **Enduring Power of Attorney**

A legally recognised arrangement that lets you plan ahead for a time when you may be unable to make certain decisions for yourself. It lets you set out the types of decisions you may need help with and appoint someone you know and trust to make them on your behalf.

### **Attorney**

A person who has the authority from an Enduring Power of Attorney to make certain decisions on your behalf if you become unable to make them for yourself.

### **Advance Healthcare Directive**

A legally recognised arrangement that lets you plan ahead for healthcare and treatment decisions. It lets you set out your wishes about these types of decisions in case you are unable to make these decisions sometime in the future.

### **Designated Healthcare Representative**

A person who has the authority to make certain decisions on your behalf regarding healthcare and treatment decisions. These decisions must be based on your wishes set out in an advance healthcare directive. They can only act on your behalf if you lose the ability to make certain healthcare decisions for yourself.

# THE ASSISTED DECISION-MAKING (CAPACITY) ACT 2015

For more information about the new system of tiered decision-making supports and advance planning tools, visit the Decision Support Service at [www.decisionsupportservice.ie](http://www.decisionsupportservice.ie) or send a query to [queries@decisionsupportservice.ie](mailto:queries@decisionsupportservice.ie) or phone 01 2119750. You can also find some useful resources including a glossary of key terms at: [www.decisionsupportservice.ie/resources/key-terms](http://www.decisionsupportservice.ie/resources/key-terms).

## BACKGROUND TO THE ACT

### What is the Assisted Decision-Making (Capacity) Act 2015?

The Assisted Decision-Making (Capacity) Act (the 2015 Act) was first signed into law in December 2015, however it was not commenced at that time. The Act was amended by the Assisted Decision-Making (Capacity) (Amendment) Act 2022 and commenced on 26 April 2023. This means that there is now a new system of tiered decision-making supports and advance planning tools available.

### What is the purpose of this Act?

The Act recognises that all adults have the right to play an active role in decisions that affect them. These decisions can be about their personal welfare and/or their property and financial affairs. The 2015 Act brings about important changes for people who require support to make decisions and for anyone interacting with them.

It introduces three types of support arrangements for people who currently, or may shortly, face challenges when making certain decisions. It also provides for people who wish to plan ahead for a time in the future when they might lose capacity, by way of an Advance Healthcare Directive or an Enduring Power of Attorney.

### How will the Assisted Decision-Making (Capacity) Act 2015 affect me as a family carer?

In practice, family members and carers frequently make day-to-day decisions, including decisions on the spending of money, on behalf of people who lack capacity. However, without a support arrangement in place, there is no legal right to make such decisions for adults nor is there any protection for the person making the decision.

The family members and friends who care for a person due to their illness, frailty, disability, mental health difficulty or addiction are therefore the most likely people to bring this legislation to life by assuming the role of a decision supporter.

If you care for an adult who has difficulty making decisions without support, or for someone who may experience difficulty making decisions in the future, then it is important that you understand the protections and provisions contained within the Act, and how they can support you and the person you care for.

## **CAPACITY**

### **What does the Assisted Decision-Making (Capacity) Act 2015 mean when it refers to a 'relevant person'?**

When the 2015 Act refers to a 'relevant person', it means a person whose capacity to make one or more decisions is, or may shortly be, in question. Under the new law, a person's capacity must be assessed based on their ability to make a specific decision at a specific time. Where a relevant person lacks capacity to make a specific decision on their own, he or she can appoint a person to assist, co-decide, or have somebody appointed to represent them for the purpose of making a decision.

### **What are the Guiding Principles of the Act?**

Section 8 of the Act sets out nine guiding principles for anyone interacting with a person who has difficulties with their decision-making capacity. The guiding principles are as follows:

1. Presume every person has the capacity to make decisions about their life.
2. Support people as much as possible to make their own decisions.
3. Don't assume a person lacks capacity just because of an unwise decision.
4. Only take action where it is really necessary.
5. Any action taken should be the least restriction on a person's rights and freedoms.
6. Give effect to the person's will and preferences as far as practicable and act at all times in good faith and for their benefit.
7. Consider the views of other people.
8. Think about how urgent the action is.
9. Use information appropriately.

### **How is Capacity Assessed?**

A person is always presumed to have capacity to make decisions about their own life. The first step is to support people to make their own decisions. In some circumstances, there may be a reason to question a person's capacity to make a certain decision. In these instances, a person's capacity will be assessed by way of a capacity assessment.

The assessment used under the new law involves a functional test for capacity. This means the assessment is about one or more specific decisions that need to be made at a specific time. You cannot make a blanket assessment that a person has no capacity.

The functional test for capacity finds that a person will lack capacity to make a decision if he or she is unable:

- (a) to understand the information relevant to the decision;
- (b) to retain that information long enough to make a voluntary choice;
- (c) to use or weigh up that information as part of the process of making the decision; and
- (d) to communicate his or her decision by whatever means (whether by talking, writing, using sign language, assistive technology).

***The person I care for currently lacks capacity to make decisions in relation to their property and money matters but can make decisions in relation to their personal welfare. How would their capacity be assessed using the functional approach?***

*A functional approach recognises that decision-making capacity can fluctuate, and is specific to the particular decision. While a person may have difficulty or lack capacity to make some types of decisions it does not mean that the person lacks capacity to make other types of decisions.*

*It also recognises that a person may lack decision-making capacity at one time, but not lack capacity if presented with the same decision at another time. Functional capacity considers the person's process of making a decision, and not the outcome of the decision itself.*

*In this scenario, you should talk to the person you care for about making a decision support arrangement to assist them in making decisions about their property and money matters. This would not affect their capacity to make decisions about their personal welfare. You can look at the different types of decision support arrangements available with them to figure out which one would work best for them.*

## **THE DECISION SUPPORT SERVICE**

### **What is the Decision Support Service?**

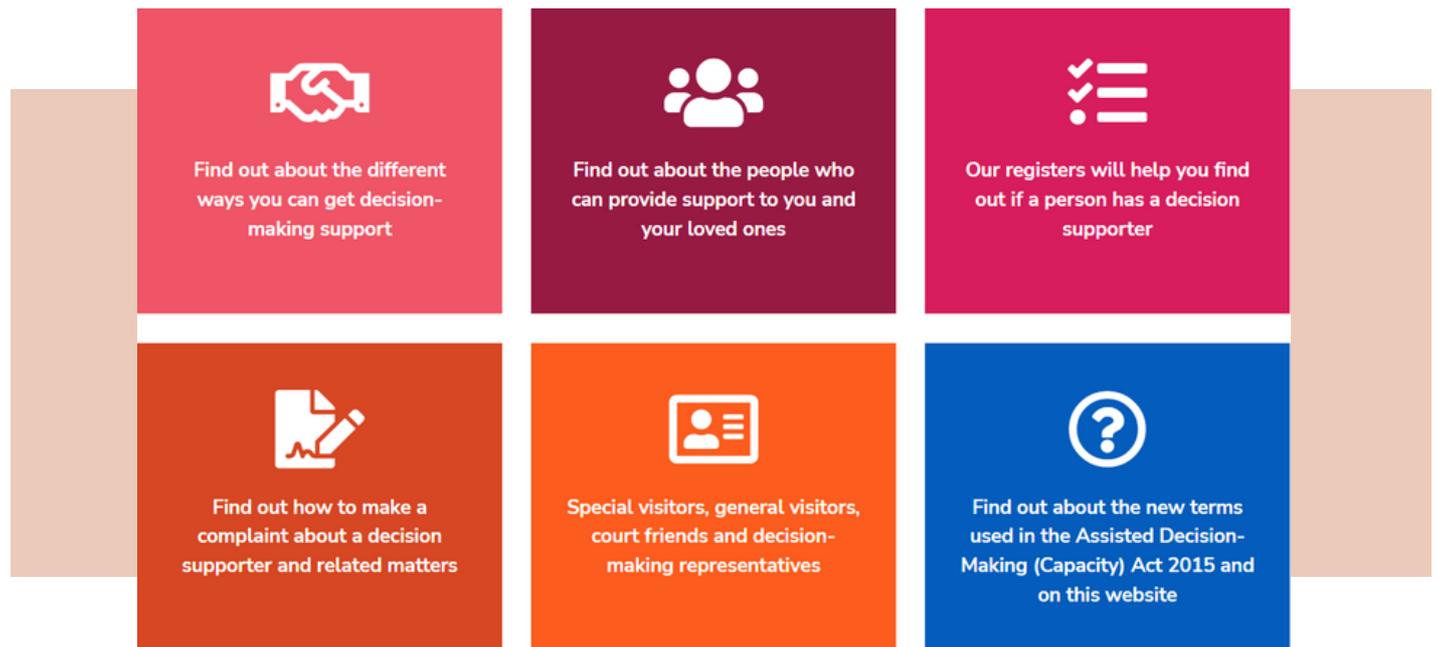
The Decision Support Service (DSS) is a new service for all adults who have or may have difficulty with decision making. Its job is to register the new decision support arrangements and supervise the individuals who are providing support to people with capacity difficulties.

What new powers will the Decision Support Service have?

The 2015 Act introduces important safeguards requiring the Decision Support Service to oversee and supervise decision support arrangements. This includes the monitoring of decision supporters, for example, through the review of objections and the review of annual monitoring reports. The Decision Support Service will also receive and investigate complaints made about decision supporters and decision support arrangements.

## How will I access the Decision Support Service?

The Decision Support Service will provide a “digital-first” service. This means that you will be able to access its services through its website at <https://www.decisionsupportservice.ie/>. You and your decision supporter will have to set up an account with the Decision Support Service before you register a decision-support arrangement. When signing up, you will have to provide the DSS with your MyGovID, some personal details and contact information. The DSS will also have paper options and a telephone support line available for people who need them.



## FAMILY CARERS & THE ASSISTED DECISION-MAKING (CAPACITY) ACT

### What rights do family carers have when it comes to making decisions for a person who faces challenges with their decision-making capacity?

To date, there is no legal basis for a family member or ‘next-of-kin’ to take on an automatic decision-making role or to give or withhold consent on behalf of another adult.

It is important to be aware that a ‘next of kin’ cannot therefore assume an automatic decision-making role or supply or withhold consent on behalf of another adult without a decision support arrangement in place. If the person you care for has difficulty making certain decisions, you should discuss with them the different types of decision support arrangements available to find out whether they would like assistance in making decisions and if so, to help them figure out which arrangement would work best for them.

If you believe that the person you care for needs limited support to help them make decisions for themselves, the lowest tier - a Decision-Making Assistance Agreement - may be the most suitable option. If they need someone to make decisions jointly with them, the middle tier - a Co-Decision-Making Agreement - may be more suitable. If the person is unable to make certain decisions even with the support of a Co-Decision-Maker, it may be necessary to ask the court to make a Decision-Making Representation Order.

## The person I care for needs support to make certain decisions. How can I take on a decision-making support role under the new Act?

Now that the 2015 Act has commenced, a person who has difficulty making decisions may give someone they know and trust, such as a family member or carer, the legal authority to act as their decision supporter. The Decision Support Service will provide information for family members and carers who wish to help a person to make a decision support arrangement. The person's need for a decision support arrangement will depend on their circumstances and the decisions that they need to make.

### What is a 'decision supporter'?

The term decision supporter is not actually mentioned in the Act but it refers to a person who has been appointed as a:

- Decision-Making Assistant under a Decision-Making Assistance Agreement
- Co-Decision-Maker under a Co-Decision-Making Agreement
- Decision-Making Representative under a Decision-Making Representation Order
- Attorney under an Enduring Power of Attorney
- Designated Healthcare Representative under an Advance Healthcare Directive.

Ideally, a decision supporter will be a family member or trusted friend.

### What if someone has no one to be their decision supporter?

If someone does not have a person they know and trust who is able to be their decision supporter, at the upper tier of support, the Circuit Court may be able to nominate a Decision-Making Representative from the Decision Support Service's expert panel. A Decision-Making Representative can only be assigned to a person by a court order.

## DECISION SUPPORT ARRANGEMENTS

### What are decision support arrangements?

Decision support arrangements are legally recognised arrangements for people who need support to make certain decisions. At different times in our lives, we all need to make decisions. We make important decisions about our finances, property, employment, accommodation, healthcare and social supports.

There are five different decision support arrangements available. These arrangements are based on the different levels of support that a person requires to make a specific decision at a specific time.



## What levels of decision support will be available?

There are three tiers of decision support available for people who currently, or may shortly, face challenges when making certain decisions. These are:

1. **Decision-Making Assistance Agreement** (the person makes their own decision with support from their Decision-Making Assistant. Their Decision-Making Assistant helps them to access and to understand information and to communicate their decision)
2. **Co-Decision-Making Agreement** (the person makes specified decisions jointly with a Co-Decision Maker)
3. **Decision-Making Representation Order** (the court appoints a Decision-Making Representative to make certain decisions on the person's behalf).

There are two types of arrangements for people who wish to plan ahead for a time in the future when they might lose capacity to make certain decisions. These are:

1. Advance Healthcare Directive
2. Enduring Power of Attorney

## What types of decisions should be included in a decision support arrangement?

When someone is planning a decision support arrangement, they should think about including decisions about:

### Property and Affairs

- Managing property, including purchasing goods and services
- Selling, mortgaging or disposing of property
- Buying property
- Business decisions
- Ending a partnership
- Carrying out a contract
- Managing debts and taxes
- Exercising the powers of a tenant for life
- Providing for the needs of other people
- Court proceedings
- Applying for social services

### Personal Welfare

- Accommodation
- Employment
- Education and training
- Social activities
- Social services
- Healthcare
- Other matters about your well-being



## Will I need a lawyer to make a decision support arrangement?

You don't need a lawyer to make a decision support arrangement. Detailed information on how to make a decision support arrangement will be available on the Decision Support Service website for you to follow.

However, the higher the level of support needed, the more complex the process becomes and therefore it would be advisable to seek legal advice when considering your options. For example, if you wish to make an Enduring Power of Attorney under the new law you will need a statement from a lawyer together with a statement from a medical practitioner or another healthcare professional confirming that you have the capacity to make it.

The Decision Support Service has have a dedicated information services team to help with any queries and to provide relevant information. You can contact the DSS on 01 211 9750 or email [queries@decisionsupportservice.ie](mailto:queries@decisionsupportservice.ie).

## LEGAL AID ELIGIBILITY

### Is Legal Aid available to a person making a decision support arrangement or a decision supporter?

You may be entitled to Legal Aid and legal advice if you are involved in a court application, or you are the subject of a court application under the 2015 Act. Eligibility for Legal Aid is generally subject to a financial means test and an assessment of the legal merit of your case. However, the merits test is reduced for court applications under the 2015 Act. The financial means test does not generally apply to the relevant person, the person at the centre of any application.

Court applications include:

- Declarations as to Capacity
- Decision-Making Orders
- Decision-Making Representation Orders
- Discharge of Wards of Court

Legal Aid may also be available in connection with the drafting of Decision-Making Assistance Agreements, Co-Decision-Making Agreements, Advance Healthcare Directives, and Enduring Powers of Attorney. For more information and to see whether you are eligible for Legal Aid, visit [www.legalaidboard.ie](http://www.legalaidboard.ie).

**Lucy is an adult with an intellectual disability and lives with her brother Sean who attends appointments with her. At a recent routine dental appointment, Lucy became agitated and did not want to enter. Lucy is refusing to answer any questions and is becoming upset. Sean wanted the dentist to continue with the check up and expected that he could consent on Lucy's behalf as her 'next-of-kin'.**

**Does Lucy have capacity in this scenario?**

*It is useful here to consider the guiding principles of the Capacity Act. In line with these principles, Lucy is presumed to have capacity to make decisions about her own life, even if you don't agree with her decision or think it's unwise. The functional approach to capacity recognises that decision-making capacity can fluctuate, and it is specific to the particular decision at a particular time. Therefore, while Lucy might be struggling to make a decision at this particular time in this particular situation, it does not mean that she will not be able to make the decision to proceed with the dental examination on another day. The appointment is not urgent or an emergency, so Lucy should be given the opportunity to make another appointment and to reassess her options at another time.*

**Does Sean have the authority to consent on Lucy's behalf as her 'next-of-kin'?**

*A 'next-of-kin' has no authority to make decisions on behalf of another person. Every adult is presumed to have decision-making capacity and may choose whether or not a family member is involved when they are making decisions. Sean therefore does not have any legal authority to provide consent on Lucy's behalf.*

**What options are available to Lucy and Sean if Lucy continues to face challenges making decisions such as this?**

*If Lucy continues to face challenges making decisions, then she may give someone that she knows and trusts, such as Sean, the legal authority to act as her decision supporter. The type of decision support arrangement that would be best for Lucy will depend on her circumstances as a whole and the decisions that she needs to make. A decision supporter has an obligation to always have regard to a person's will and preferences as far as practicable and to always act for their benefit, which includes minimising any restrictions to their rights and freedoms.*

*Most people (whether their capacity is impaired or not) make healthcare decisions in conjunction with other people. The advantage of the new framework is that the chosen support person will now have legal standing. This requires healthcare professions to engage with the patient in the context of his or her relationship with his or her chosen decision supporter. Where this relationship is good, this offers potential for improved and enhanced healthcare decision-making by patients with impaired capacity and allows patients a greater degree of control.*

## DECISION-MAKING ASSISTANCE AGREEMENT

### In what situations might the person I care for consider making a Decision-Making Assistance Agreement?

If the person you care for needs support to make certain decisions on their own, then they might want to consider making a Decision-Making Assistance Agreement. This agreement lets this person appoint someone they know and trust as a Decision-Making Assistant. These decisions can be about personal welfare or property and money matters. The agreement will be valid on an ongoing basis unless the relevant person and/or their Decision-Making Assistant decides to revoke the arrangement.

### What would my role be as a Decision-Making Assistant?

The role of a Decision-Making Assistant is to help the relevant person to get information and to help them to understand and weigh up their options. The Decision-Making Assistant's role is to help the person to make decisions for themselves. You can also support the person to let other people know about the decision that has been made and make sure it is acted on.

### Can the person I care for have more than one Decision-Making Assistant?

Yes, a person can have more than one Decision-Making Assistant. They can decide whether these supporters have to make all decisions together, can make any decision separately, or have to make certain decisions together while others can be made separately.

### How does the person I care for make a Decision-Making Assistance Agreement?

The easiest way to make this application is via the MyDSS portal:

<https://portal.decisionsupportservice.ie>. It must include a statement by the relevant person that they understand the agreement. The Decision-Making Assistant must also confirm that they understand their duties and will carry them out. The Decision Support Service will be able to provide the person you care for with a certified copy of the agreement which can be used by you, as the Decision-Making Assistant, to show that you have the legal authority to help the person you care for.

### Is a Decision-Making Assistance Agreement monitored by the Decision Support Service?

As a Decision-Making Assistant, you are not required to submit reports to the DSS unless requested to do so. There may be instances where you will need to provide a report, for example where a complaint is received about you or the DSS want to check out the agreement is working the way that it should.

### **How does the person I care for end a Decision-Making Assistance Agreement?**

The person you care for or you, as a Decision-Making Assistant, can end the Decision-Making Assistance Agreement at any time. It does not need to be replaced by another type of decision support arrangement. However, if the person you care for needs more support for making decisions, they might need a Co-Decision-Making Agreement or a Decision-Making Representative.

### **How does the person I care for change a Decision-Making Assistance Agreement?**

The person you care for can decide to change the Decision-Making Assistance Agreement at any time. Any changes must come from the person you care for and not the Decision-Making Assistant. However, you, as the Decision-Making Assistant, will need to agree to the changes.

### **What does it cost to make a Decision-Making Assistance Agreement?**

There will be a fee to notify the Decision Support Service about the Decision-Making Assistance Agreement. Further information on fees is available from the Decision Support Service.

## **CO-DECISION-MAKING AGREEMENT**

### **In what situations might the person I care for consider making a Co-Decision-Making Agreement?**

If the person you care for needs a higher level of support then they can make a Co-Decision-Making Agreement. This agreement lets a person choose someone they know and trust to act as a Co-Decision-Maker. The Co-Decision-Maker and the person make the decision together.

### **What would my role be as a Co-Decision-Maker?**

As a Co-Decision-Maker, you make certain decisions jointly with the person you care for. You will also help them to gather information and explain it to them in order for them to understand and weigh up their options. You can also support them to let other people know about the decision you have made together.

The Co-Decision-Maker must also send a written report to the Decision Support Service every year. These reports must include details of financial matters, costs and expenses related to the agreement.



## Can the person I care for have more than one Co-Decision-Maker?

A person can appoint more than one person as a Co-Decision-Maker if the person would like different people to assist them in making different decisions. However, to do so, a person will have to make separate Co-Decision-Making Agreements with each person. Essentially, a person can have more than one Co-Decision-Making Agreement, but they can only have one Co-Decision-Maker for each agreement.

***Stephen cares full-time for his vulnerable adult son, Michael. Michael is also very close to his sister, Alice. Michael has difficulty making important decisions and feels he needs support from people he trusts to help him to understand his options and to make certain decisions jointly with him. Michael would like support in making certain financial decisions and certain personal welfare decisions.***

*The most suitable option for Michael is to make a Co-Decision-Making Agreement(s). Michael can decide what decisions he needs support with, whether it's one stand-alone decision or a broad category of decisions, and who, such as Stephen or Alice, he would like to support him in making each decision or category of decisions. However, Michael cannot appoint both Stephen and Alice as his Co-Decision-Maker for the same decision or category of decisions.*

*In this scenario, Michael may choose to appoint one Co-Decision-Maker, such as Stephen, to make decisions jointly with him in relation to both the financial and personal welfare decisions that he needs support with. Alternatively, Michael might prefer to appoint Stephen as his Co-Decision-Maker for his personal welfare decisions and Alice as his Co-Decision-Maker for his financial decisions. If Michael would like to appoint separate Co-Decision-Makers, he will have to make separate Co-Decision-Making Agreements with Stephen and Alice respectively.*



## How does the person I care for make a Co-Decision Making Agreement?

The agreement must be in writing and must be signed by the relevant person and the Co-Decision-Maker. The agreement needs to be witnessed by two other people. It must contain details of the decisions that the relevant person and the Co-Decision-Maker will make together.

The easiest way to make this application is via the MyDSS portal:

<https://portal.decisionsupportservice.ie>. A medical practitioner or another healthcare professional (e.g. nurses, occupational therapists, social workers, speech and language therapists) will need to assess the capacity of the person and sign a statement of capacity.

The agreement must be registered with the Decision Support Service. The person you care for and you, as the Co-Decision-Maker, must tell certain people, like their spouse and adult children, about the agreement. They must also be provided with copies of the agreement. Any of those people have five weeks to object to the registration of the agreement.

## Can anyone find out if the person I care for has a Co-Decision Making Agreement?

The Decision Support Service will maintain a register of Co-Decision-Making Agreements. Approved persons and organisations, like banks, lawyers and healthcare professionals will be able to search the register. Certain people will also be able to search the register if they can show that they have a good reason to do so. This is referred to as having a 'legitimate interest'. For example, a person may be concerned that a decision support arrangement includes decisions about property, assets or other financial affairs that they themselves have an interest in. The Decision Support Service can also issue a certified copy of a Co-Decision-Making Agreement, which confirms that the agreement exists.

The DSS will keep a record of anyone who searches the register or requests a copy of a Co-Decision-Making Agreement.

## Is a Co-Decision-Making Agreement monitored by the Decision Support Service?

Yes, the Decision Support Service monitors each registered Co-Decision-Making Agreement to ensure it is working the way that it should. This includes checking that the relevant person continues to understand the agreement and that it is still in line with their wishes.

The Decision Support Service also supervises the activities of the Co-Decision-Maker. The Co-Decision-Maker must send a written report to the DSS every year. These reports must include details of financial matters, costs and expenses related to the agreement.

## How can we end a Co-Decision Making Agreement?

The person you care for or you, as the Co-Decision-Maker, can end all or part of the Co-Decision-Making Agreement at any time, either before or after it is registered with the Decision Support Service. The agreement must be ended in writing and must be signed by two witnesses.

If the relevant person wishes to end the agreement, they must provide a statement by a doctor or other healthcare professional that confirms they have capacity to revoke the agreement. If the agreement is ended after it is registered, the person who is ending it must notify the DSS. The DSS will remove all or part of the agreement from the register.

### How do we change a Co-Decision Making Agreement?

You can change a Co-Decision-Making Agreement once it has been registered with the DSS for more than six months. Both the person you care for and you, as the Co-Decision-Maker, must agree to this.

Any changes to the decisions in the arrangement can and must be made via a "variation" application. However, if the person wishes to change their supporter, this arrangement must be revoked and a new arrangement created.

### What does it cost to make a Co-Decision-Making Agreement?

There will be a fee to register a Co-Decision-Making Agreement with the Decision Support Service. There may be additional costs for getting a capacity assessment for the agreement. Some people may not have to pay a fee or will pay a lesser fee. This will depend on your individual circumstances, including your income or certain benefits you receive. Further information on fees will be available from the DSS.

***Sarah cares full-time for her sister Jane who has Down Syndrome. Sarah and Jane have managed well so far and are considering leaving things as they are even after the Act is commenced. Jane is now considering renting an apartment. If Jane decides not to appoint Sarah as her decision supporter, how will this affect Sarah's ability to support Jane in making decisions such as this?***

*It is again useful here to consider the guiding principles of the Capacity Act. The principles confirm that Jane is presumed to have capacity to make decisions about her own life and should be supported as much as possible to do so. Sarah can continue to casually support Jane to make her own decisions for as long as this arrangement works for them. There is no requirement to avail of the new support arrangements. However, if at some point in the future, Sarah or Jane think that it would be beneficial for Sarah to provide a higher level of support and assistance, then they might want to consider setting up a decision support arrangement.*

*If Jane would simply like Sarah to help her get information and weigh up her options and then assist her in informing services providers such as her bank about her decisions, then Jane would benefit from a Decision-Making Assistance Agreement. This agreement would allow Sarah to provide this assistance to Jane so that Jane can then make the decision for herself.*

*If Jane feels like she needs help to make certain decisions and feels she can't do so alone, then she might benefit from a Co-Decision-Making Agreement. This agreement would allow Sarah and Jane to make the decision together.*

## **DECISION-MAKING REPRESENTATION ORDER**

### **In what situations would the person I care for require a Decision-Making Representation Order?**

If you believe that the person you care for is unable to make certain decisions for themselves, you may ask the court to make a Decision-Making Representation Order so that you can make those decisions on their behalf. The Circuit Court will decide whether to appoint a Decision-Making Representative or someone else for the person and who will act in this role.

### **What would my role be as a Decision-Making Representative?**

As a Decision-Making Representative, you would make certain decisions on behalf of a person if they are unable to make those decisions for themselves even with the assistance of a Co-Decision-Maker. You will need to be appointed by the court to be made a Decision-Making Representative. The court will usually appoint someone that the person knows and trusts in this role.

The court order will then list all the decisions that you, as a Decision-Making Representative, can make. This may include decisions about the person's personal welfare and property and affairs. As a Decision-Making Representative, you can only make decisions that are written down in the court order and you must always consider the wishes of the relevant person when making decisions on their behalf.

### **Can more than one person be appointed as a Decision-Making Representative?**

The court can appoint more than one Decision-Making Representative to make decisions on behalf of another person. The court decides whether the Decision-Making Representatives must make decisions together, whether they can make decisions individually or both.

### **How do I apply for a Decision-Making Representative Order?**

If you believe that the person you care for is unable to make certain decisions for themselves, even with the support of a Co-Decision-Maker, you can ask the court to make a Decision-Making Representation Order. If the court agrees that the person you care for is not able to make certain decisions for themselves, it can appoint you as a Decision-Making Representative to make those decisions on their behalf. The court will consider the will and preferences of the relevant person as well as the desirability of preserving family relationships when appointing a Decision-Making Representative.

The DSS will keep a record of anyone who searches the register or requests a copy of a Decision-Making Representation Order.

### **Is a Decision-Making Representation Order monitored by the Decision Support Service?**

The Circuit Court will check that the arrangement is working the way it should on an ongoing basis.

The Decision Support Service will also monitor decisions made by the Decision-Making Representative. The Decision-Making Representative must submit a written report to the DSS every year. Each report must include any details of financial matters, costs and expenses related to the decisions included in the order. If the decisions relate to a person's property and affairs, the Decision-Making Representative must submit a list of the person's assets, liabilities, income and expenses so that the DSS can monitor these. The DMR for financial matters must submit a list of the relevant person's assets and liabilities, projected income and expenditure for the year within three months of being appointed by the court.

The DSS will examine complaints where it is alleged that a Decision-Making Representative has acted, is acting, or is proposing to act outside the scope of his or her functions as specified in the court order.

### **How can you end a Decision-Making Representation Order?**

A Decision-Making Representation Order can be ended if:

- The court decides to end the order following an application by the relevant person, the Decision-Making Representative, the DSS following an investigation into a well-founded complaint, or any other person with a genuine interest in the person's welfare.
- The court decides that the relevant person has regained capacity.
- The Decision-Making Representative is unwilling or unable to continue in their role.
- The period of time that the Decision-Making Representation Order covers has passed.

### **How do you change a Decision-Making Representative Order?**

Only the court can change a Decision-Making Representative Order. The court may decide to change a Decision-Making Representative Order following an application to the court by the relevant person, the Decision-Making Representative or any other person with a genuine interest in the person's welfare.

### **What does it cost to make a Decision-Making Representative Order?**

Details of fees payable are available on the Courts Service website [www.courts.ie](http://www.courts.ie). You may also be eligible for Legal Aid if you are involved in an application to court. It is intended that costs should not be a barrier for anyone seeking to access supports under the Act.

## **WARDS OF COURT**

### **What happens to current Wards of Court?**

When the new law comes into effect, people will no longer be able to be made a Ward of Court. Any ward of court or an interested party can apply to the wardship court to have their case reviewed. All current Wards of Court will be reviewed by the wardship court and discharged from wardship within three years after the new law comes into effect. The courts will decide whether or not a current Ward of Court needs formal support under the new Act.

## PLANNING AHEAD

There are two types of decision support arrangements that will let you and the person you care for plan ahead for a time where they might not be able to make certain decisions for themselves.

These are an Enduring Power of Attorney and an Advance Healthcare Directive. There are a number of things you can do now if you wish to make either of these types of arrangement.

### ENDURING POWER OF ATTORNEY

#### What is an Enduring Power of Attorney?

If the person you care for does not currently have capacity issues, but would like to plan ahead, they can make an Enduring Power of Attorney (EPA). This arrangement gives authority to a person they know and trust to act on their behalf should they lose the capacity to make certain decisions in the future. This person is called their attorney but does not need to be a lawyer.

An Enduring Power of Attorney can cover decisions relating to property and affairs and/or personal welfare. Decisions relating to future health (such as consent and refusal of medical treatment) are expressly excluded. If the person you care for wants to ensure that you or another trusted person can make decisions on healthcare treatments in the future then they should also create an Advance Healthcare Directive.

#### The person I care for already has an Enduring Power of Attorney in place; however, it has not yet been registered. What will happen to their current Enduring Power of Attorney?

If someone has already made an Enduring Power of Attorney (under the Powers of Attorney Act 1996) then you can keep that arrangement and it will continue to be valid. The only difference is that attorneys under the 1996 Act will be subject to the complaints and investigation function of the Decision Support Service.

Enduring Power of Attorneys created under the 1996 Act will continue to be registered with the Courts Service. EPAs that have not yet been registered may now be registered with the Decision Support Services. If you wish to make an Enduring Power of Attorney following commencement of the 2015 Act, you will only be able do so under the new law.



## **In what situations would the person I care benefit from an Enduring Power of Attorney?**

Used properly, Enduring Power of Attorneys can provide peace of mind for both the person granting the power and for the wider family. They are valuable tools for ensuring that one's wishes regarding property, affairs, and personal welfare are carried out, while also being flexible enough to be tailored to allow the scope of the powers to be as broad or as narrow as the person wishes.

## **What would my role be as an Attorney?**

As an attorney, you have the authority to make certain decision on behalf of the person you care for if they lose the ability to make those decisions in the future. An attorney can only act on behalf of the person if the Enduring Power of Attorney has been registered and the Decision Support Service has been notified. When the person losses capacity, the attorney will then notify the DSS that the person's capacity to make the relevant decisions has since been lost.

When making the Enduring Power of Attorney, a person can decide whether their attorney will have authority to act on their behalf and make decisions about property, finances and/or personal welfare.

Attorneys must submit details of assets and liabilities and projected income and expenditure for the year within the first three months along with an annual report.

## **Can the person I care for have more than one Attorney?**

The person you care for can have more than one attorney and can specify if their attorneys have to make all decisions together, can make any decision separately, or have to make certain decisions together while others can be made separately.



## What's the difference between an Enduring Power of Attorney and the other types of decision support arrangements on the new three-tier framework?

An Enduring Power of Attorney is a tool for advance planning. It allows someone who has capacity to plan ahead and to appoint a trusted person to make decisions for them in the future. The Enduring Power of Attorney only comes into effect when a person is no longer able to make decisions. The attorney then acts as the person's agent, having regard to his or her known will and preferences. Attorneys are obliged to follow the Guiding Principles and Codes of Practice relevant to them. It is a good idea to have an Enduring Power of Attorney in place as it could avoid the need for a court appointed Decision-Making Representative.

A person can have a Decision-Making Assistance Agreement or a Co-Decision-Making Agreement at present, but also decide to set up an Enduring Power of Attorney for a time when they may lose their capacity to make certain decisions even with the help of their supporter.

## How does the person I care for make an Enduring Power of Attorney?

There are two stages that must be completed before an Enduring Power of Attorney can come into force.

The first stage involves a person with capacity making an Enduring Power of Attorney to plan for the future. At this stage, an Enduring Power of Attorney must:

- Be made in writing and signed by the relevant person, their attorney and two witnesses.
- Include details of the authority the person intends to give their attorney.
- Include an assessment from a doctor or another healthcare professional as to the capacity of the person and confirm they are able to enter into the agreement.
- Include confirmation that they have talked to a lawyer, who will make sure that the relevant person understands the agreement they are signing.
- Make an application to register the document containing the Enduring Power of Attorney with the Decision Support Service within three months of making the Enduring Power of Attorney and getting the supporting statements. The easiest way to make this application is via the MyDSS portal: <https://portal.decisionsupportservice.ie>.
- Subsequently inform certain people about the arrangement, like the person's spouse/civil partner and adult children.
- Allow those people five weeks to object to the registration of the agreement. There are specific grounds on which an objection can be made which will then be reviewed by the Decision Support Service.

The second stage of an Enduring Power of Attorney only comes about if the relevant person loses capacity to make certain decisions. If this happens, their attorney must notify the Decision Support Service for the Enduring Power of Attorney to take effect.

### **The second stage requires the attorney to:**

- Notify the DSS that the relevant person lacks capacity to make certain decisions. The easiest way to make this application is via the MyDSS portal: <https://portal.decisionsupportservice.ie>.
- Include two statements from a doctor and/or another healthcare professional that the person lacks capacity to make certain decisions which are provided for in the Enduring Power of Attorney.
- Inform certain people, for example, the person's spouse/civil partner and adult children, and give them a copy of the agreement.
- Allow those people five weeks to object to the notification. There are specific grounds on an objection can be made which will then be reviewed by the DSS.
- Pending acceptance of the notification by the DSS, the attorney may take action and make certain decisions on behalf of the relevant person which cannot wait for the notification to be accepted. This is only in certain specific cases - to maintain the donor/prevent loss to their assets, where the decision cannot reasonably be deferred until after the notification is accepted, or to remunerate the attorney or other persons as permitted under the power.

### **Can people check if the person I care for has an Enduring Power of Attorney?**

The Decision Support Service will maintain a register of Enduring Power of Attorneys. The register will specify whether or not an Enduring Power of Attorney has come into force (i.e. the DSS has accepted that the person lacks capacity). The register will be searchable and will hold those EPAs that have come into force. Approved persons and organisations, like banks, lawyers and healthcare professionals will be able to search the register. Certain people will also be able to search the register if they can show that they have a good reason to do so. This is referred to as having a 'legitimate interest'. For example, a person may be concerned that a decision support arrangement includes decisions about property, assets or other financial affairs that they themselves have an interest in. The Decision Support Service can also issue a certified copy of the Enduring Power of Attorney.

The DSS will keep a record of anyone who searches the register or requests a copy of an Enduring Power of Attorney.

### **Is an Enduring Power of Attorney monitored by the Decision Support Service?**

Once an Enduring Power of Attorney has come into force, the DSS will monitor decisions made by the attorney as part of the arrangement.

Once the attorney has the authority to make decisions about the relevant person's property and affairs, they must submit a list of their assets, liabilities, income and expenses so that they can be monitored by the DSS. The attorney will also be required to submit within three months a written report to the DSS every year. Each report must include any details of costs, expenses and money paid to the attorney in relation to their duties.

## How can we end an Enduring Power of Attorney?

A person can end their Enduring Power of Attorney at any time before the attorney has made a notification to the Decision Support Service under the second stage of the Enduring Power of Attorney. The Enduring Power of Attorney must be ended in writing and signed by the person themselves and two witnesses. It must be accompanied by statements by the donor that they understand the implications of revoking the enduring power, by a legal practitioner confirming that the donor understands the implication of ending the power, and by the attorney stating that they are aware that the power has been revoked and undertakes to act accordingly.

An attorney can resign from their role after the Enduring Power of Attorney has been registered but before it has entered into force by notifying the relevant person and the DSS that they wish to do so. However, once an Enduring Power of Attorney has come into force, the attorney can only resign from their role with the consent of the court.

Once the Enduring Power of Attorney has come into force and the DSS has accepted the notification of the attorney in this regard, the relevant person must request the DSS to end the Enduring Power of Attorney and provide statements from a legal practitioner and two statements from either a registered medical practitioner or a healthcare professional to confirm that, if relevant, the person has regained their capacity.

## How do we change an Enduring Power of Attorney?

A person can change their Enduring Power of Attorney at any time after 6 months has passed since the Enduring Power of Attorney was registered or 12 months since the last variation and before the attorney has made a notification to the Decision Support Service under the second stage of the Enduring Power of Attorney. Any changes to the Enduring Power of Attorney must be made in writing and signed by the person themselves and two witnesses. It must be accompanied by statements by a medical practitioner or healthcare professional and a lawyer confirming that the person understands the implications of changing the Enduring Power of Attorney.

Once the Enduring Power of Attorney has come into force and the DSS has accepted the notification of the attorney in this regard, changes to an Enduring Power of Attorney cannot easily be made except in specific circumstances.

## What does it cost to make an Enduring Power of Attorney?

There will be a fee to register an Enduring Power of Attorney with the Decision Support Service. Further information about fees is available from the DSS.

## ADVANCE HEALTHCARE DIRECTIVE

### What is an Advance Healthcare Directive?

If the person you are caring for is planning ahead, they can make an Advance Healthcare Directive (AHD). This arrangement lets the person you care for write down their wishes about healthcare and medical treatment decisions in case they are unable to make these decisions at some time in the future. Importantly, it also lets them write down any treatments that they do not want.

They can then appoint someone they know and trust as their Designated Healthcare Representative to ensure their Advance Healthcare Directive is followed. Doctors and other healthcare professionals must consult a person's Advance Healthcare Directive if they lose the ability to make a treatment decision.

### What would my role be as a Designated Healthcare Representative?

As a Designated Healthcare Representative, your role is to make healthcare and treatment decisions on behalf of the person you care in accordance with their wishes as set out in their Advance Healthcare Directive. A Designated Healthcare Representative only acts on the person's behalf if they lose the ability to make certain healthcare decisions for themselves. The person can give their Designated Healthcare Representative the power to interpret their wishes, and to agree or refuse treatment on their behalf, based on what's set out in the AHD.

### Can the person I care for have more than one Designated Healthcare Representative?

The person you care for can appoint an alternate Designated Healthcare Representative who can act should the Designated Healthcare Representative be unable to do so.

### How does the person I care for make an Advance Healthcare Directive?

An Advance Healthcare Directive must be made in writing and signed by the relevant person, two witnesses, and by their Designated Healthcare Representative, if they decide to have one.

The person you care for can write down any treatments they wish to refuse and the circumstances in which this should apply.

They can also include requests for specific treatments. Requests for treatments are not legally binding. However, by including them they can make sure they are considered during any related decision-making process.

## Does the Decision Support Service need to be informed that an Advance Healthcare Directive has been made?

Currently, you do not have to notify the DSS that an Advance Healthcare Directive has been made. There is no set form to complete an Advance Healthcare Directive, however there is a template form available from the Irish Hospice Foundation as part of their [Think Ahead pack](#).

It is also advised that you give a copy of your Advance Healthcare Directive to your GP or treating doctor for your patient records.

## Can people check if the person I care for has an Advance Healthcare Directive?

The Decision Support Service will maintain a register of Advance Healthcare Directives, once regulations have been made by the Department of Health. Healthcare professionals and certain other people will be able to search the register if they have a good reason to do so.

It is also recommended that a copy of the AHD is provided to the relevant person's GP and any other healthcare professional who may provide them with treatment. Healthcare professionals must check if a person has an Advance Healthcare Directive if they lack the capacity to make a treatment decision.

## Is an Advance Healthcare Directive monitored by the Decision Support Service?

If the person you care for loses the capacity to make certain healthcare and treatment decisions, you, as the Designated Healthcare Representative, must make a record of any decision made that relates to their Advance Healthcare Directive. You must do this as soon as possible and no later than seven days after the decision has been made.

If the person regains capacity, you, as the Designated Healthcare Representative, must provide a copy of this record to them. The DSS can also request a copy of this record.

## How can the person I care for end an Advance Healthcare Directive?

Anyone can end their Advance Healthcare Directive at any time if they have capacity to do so. An Advance Healthcare Directive only starts to apply if the relevant person loses capacity. An Advance Healthcare Directive must be ended in writing.



### **How can the person I care for change an Advance Healthcare Directive?**

Anyone can change their Advance Healthcare Directive at any time if they have capacity to do so. Any change to a person's Advance Healthcare Directive must be made in writing, signed by themselves, two witnesses, and by their Designated Healthcare Representative, if they have one. It can be a good idea to remind the person you care for to review and update their Advance Healthcare Directive on a regular basis to ensure that it reflects their wishes. An AHD should also be reviewed and updated following any major medical treatment or diagnoses to ensure it reflects the person's current wishes with regard to future treatment.

### **What does it cost to make an Advance Healthcare Directive?**

It will not cost anything to make, change or end an Advance Healthcare Directive.

### **What happens if a person has not made an Enduring Power of Attorney or Advance Healthcare Directive and now lacks capacity to make decisions?**

Where a person is considered to lack capacity to make the specific decision and has not planned ahead with an Enduring Power of Attorney and/or an Advance Healthcare Directive, the Circuit Court can appoint a Decision-Making Representative to make the decision on behalf of the person.

### **What will happen in a medical emergency?**

If there is a medical emergency, and a person does not have a decision supporter or an advance statement (for example an Advance Healthcare Directive or an Enduring Power of Attorney), a healthcare professional may need to provide the person with necessary treatment without their consent. If the person does have a decision supporter or an advance statement - and the healthcare professional has access to it, they will have to consult their supporter or statement, unless the delay in doing so might cause the person serious harm.

It is important that if a person you care for makes an Advance Healthcare Directive or an Enduring Power of Attorney, which includes their wishes about healthcare and treatment, that you let important people know, like family, friends and their general practitioner.

In this way, you can help to make sure their medical wishes are respected even in an emergency.



**Niall has recently been diagnosed with dementia. He has no difficulty making decisions now, but he fears he may have difficulty in the future and wants to plan ahead. Niall is married to Ann and has two adult sons, Andrew and Cian. Niall would like his family to be involved in making decisions on his behalf if the time comes. What options are available to Niall?**

There are two types of decision support arrangements that will help Niall and his family to plan ahead for a time when he might not be able to make decisions for himself. These are an Enduring Power of Attorney (EPA) and an Advance Healthcare Directive (AHD). As both EPAs and AHDs involve a total loss of capacity, it would make sense for Niall to make an EPA and an AHD at the same time.

In this scenario, Niall should consider making an EPA to ensure that his wishes regarding his property, money and personal welfare are carried out. He can appoint Ann, Andrew and Cian to act as his attorneys to make these decisions on his behalf. At this stage, Niall will need to set out his wishes and provide the necessary statements to confirm his capacity. He will then need to register this document with the Decision Support Service. He can do this by making an application to the Decision Support Service to create an Enduring Power of Attorney.

Niall has stated that he would also like to set out his wishes in relation to his medical treatment in the future. However, an EPA cannot be used for healthcare related decisions. Niall should therefore consider also making an Advance Healthcare Directive. Niall would like to appoint Ann as his Designated Healthcare Representative and Andrew as his alternate Designated Healthcare Representative. He should also give a copy of his AHD to his GP or treating doctor.

If in the future it becomes clear that Niall has lost the ability to make decisions relating to his personal welfare and/or property and affairs, Ann or his sons should notify the Decision Support Service and provide them with the necessary statements to confirm that he now lacks capacity. Once the DSS accepts this notification, Ann, Andrew and Cian will have the authority to make decisions relating to his property, money and personal welfare on his behalf and in accordance with his wishes and the guiding principles of the Capacity Act. They are now also required to submit a written report to the DSS each year to provide an update on how they are getting on as Niall's attorneys.

As Niall has also lost the ability to make certain healthcare decisions, Ann, as his Designated Healthcare Representative, can make healthcare and treatment decisions on his behalf in accordance with his wishes that he set out in his AHD. Ann has an obligation to record any decisions that she makes and may need to provide healthcare professionals with a copy of Niall's AHD to confirm that she has authority to make these decisions.



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Family Carers Ireland, National Office, Market Square, Tullamore, Co. Offaly, R35 PW50

**Email:** [info@familycarers.ie](mailto:info@familycarers.ie) | **Web:** [www.familycarers.ie](http://www.familycarers.ie)

Freephone Careline 1800 24 07 24